

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 30

[Docket No. FR 4553-A-01]

RIN 2501-AC66

Treble Damages for Failure To Engage in Loss Mitigation; Advance Notice of Proposed Rulemaking

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This notice announces HUD's intention to issue a proposed rule to amend HUD's Civil Money Penalty regulations to provide for damages of three times the amount of any mortgage insurance benefit claimed by the mortgagee for any mortgage as to which the mortgagee failed to engage in loss mitigation actions. Current regulations provide that HUD may initiate a civil money penalty action against mortgagees and lenders for certain prohibited conduct, including failure to service FHA insured mortgages in accordance with FHA regulations. However, in 1998, Congress amended the National Housing Act, as more particularly described below, to add a triple penalty to the existing civil money penalty system for a mortgagee's failure to engage in loss mitigation. Specifically, HUD seeks comments regarding the best regulatory procedures and structures for implementing this Congressional mandate. This notice therefore solicits public comment on the subject prior to publication of a proposed rule.

DATES: Comment Due Date: February 5, 2001.

ADDRESSES: Interested persons are invited to submit comments and responses to the Rules Docket Clerk, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington DC 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) responses are not acceptable. A copy of each response will be available for public inspection and copying during regular business hours (7:30 a.m. to 5:30 p.m. Eastern Time at the above address).

FOR FURTHER INFORMATION CONTACT: Jack Tautges, Office of The Deputy Assistant Secretary for Single Family Housing, Room 9184, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, D.C., 20410,

telephone (202) 708-1672 (this is not a toll-free number). Hearing or speech-impaired individuals may access these numbers via TTY by calling the Federal Information Relay Service at 1-800-877-8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 601(f), (g) and (h) of the Department of Veteran's Affairs and Housing and Urban Development and Independent Agencies Appropriations Act (1999) (Pub. L. 105-276, approved October 21, 1998) amended sections 230, 536(a), and 536(b)(1) of the National Housing Act ("NHA") (12 U.S.C. 1715u, 12 U.S.C. 1735f-14(a)(2) and 12 U.S.C. 1735f-14(b)(1), respectively) to add a triple penalty for failure to engage in loss mitigation to the existing civil money penalty system. Among other things, the statute now requires that, upon the default of a single family mortgage insured under Title II of the National Housing Act, it is mandatory for the mortgagee to engage in loss mitigation actions (including, but not limited to, special forbearance, loan modification, and deeds in lieu of foreclosure) for the purpose of providing alternatives to foreclosure. Also, added to the actions in section 536(b) for which the Secretary "may impose a civil money penalty on the mortgagee or lender" is "failure to engage in loss mitigation actions as provided in section 230(a) of this Act [i.e., the NHA]." See section 536(b)(1)(I), 12 U.S.C. 1735f-14(b)(1)(I). In the case of such failure, "the penalty shall be in the amount of three times the amount of any insurance benefits claimed by the mortgagee with respect to any mortgage" as to which such failure occurred. See section 536(a)(2), 12 U.S.C. 1735f-14(a)(2).

The regulation relating to civil money penalties for mortgagees who engage in prohibited acts is found at 24 CFR 30.35. This regulation was promulgated in its current form on September 24, 1996 (61 FR 50215) and technically amended on February 26, 1998 (63 FR 9742). The regulation currently provides for a maximum penalty of \$5,500 for each violation, up to a maximum of \$1,100,000 for all violations committed within any one-year period. A variety of prohibited acts are covered, including, generally, a failure to service a mortgage in accordance with 24 CFR part 203. See 24 CFR 30.35(a)(10). The requirement to engage in loss mitigation is set forth primarily at 24 CFR 203.501, which cross-references actions including, but not limited to, deeds in lieu of foreclosure (24 CFR 203.357); special

forbearance (24 CFR 203.471, 203.614); partial claims (24 CFR 203.414); assumptions (24 CFR 203.512); and recasting of mortgages (24 CFR 203.616). In addition, regulations require lenders to engage in a loss mitigation evaluation to determine which loss mitigation options are appropriate (24 CFR 203.605).

Ordinary civil penalties will remain in effect for failure to engage in a variety of required servicing functions, including, but not limited to: pre-foreclosure review to ensure that all servicing requirements have been met (24 CFR 203.606); giving each mortgagor in default the notice of default (24 CFR 203.602); and monthly reporting concerning all properties that are 90 days or more delinquent (24 CFR 203.332).

This Advance Notice of Proposed Rulemaking

HUD plans to issue a proposed rule implementing the new requirement to assess treble damages when a mortgagee fails to engage in any loss mitigation activities with cooperative and qualified mortgagors. HUD's goals are to foster an increase in loss mitigation efforts by lenders, to decrease losses to FHA's insurance fund, to help borrowers retain their homes, to integrate the pre-existing civil money penalty system with the new requirement of treble damages, and to avoid punishing lenders who have overall good records.

To that end, HUD plans to propose a rule that would assess treble damages considering both single-loan performance and overall portfolio performance. As to a single loan that goes into default, HUD proposes to regard a lender as having failed to engage in loss mitigation if the lender has failed to perform the loss mitigation evaluation under 24 CFR 203.605 and then take the appropriate loss mitigation action(s). In that case, the lender would be potentially subject to treble damages. As a further step, HUD proposes to establish a system of analyzing a mortgagee's loss mitigation efforts portfolio-wide by using a tiered scoring system based on performance ratios of loss mitigation actions divided by Real Estate Owned ("REO"). Based on the loss mitigation/REO ratio established, HUD plans to propose to group lenders in four tiers in relation to the mean or some other identified score. HUD plans to propose a system in which lenders in the top three tiers, i.e., those who have relatively good records of making loss mitigation efforts, would not be subject to treble damages, and those in the bottom tier who violate the regulation would be subject to treble damages.

HUD specifically invites comments on this proposed tiering system, including comments regarding the specific tier structure based on performance ratios of loss mitigation actions to REO. HUD also welcomes suggestions regarding other factors, if any, that commenters believe should be included in the ratio.

In addition, HUD welcomes general comments regarding the proposed rule. HUD will review all public comments submitted in connection with preparing the proposed rule on this subject. HUD will promulgate a proposed rule that

implements a system for assessing treble damages against mortgagees who fail to engage in loss mitigation with cooperative and qualified borrowers.

Executive Order 12866

The Office of Management and Budget (OMB) reviewed this advance notice of proposed rulemaking (ANPR) under Executive Order 12866, *Regulatory Planning and Review*, issued by the President on September 30, 1993. Any changes made in this ANPR subsequent to its submission to OMB are identified

in the docket file, which is available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street, S.W., Washington, DC 20410.

Dated: November 29, 2000.

William C. Apgar,

Assistant Secretary for Housing—Federal Housing Commissioner.

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